The Democratic Backsliding and the European constitutional design in error. When will HOW meet WHY?

Tomasz Tadeusz Koncewicz 2018-12-18T10:07:55

Constitutional design of the post – 1945 liberal consensus

When is the constitutional design of any (domestic, international, supranational) polity in error? On the most general level such critical juncture obtains when polity's founding document (treaty, convention, constitution) protects against the dangers that *no longer exist* or *does not protect* against the dangers that were not contemplated by the Founders. While discussion of the evolution of human rights and international actors in response to *social change* (LGBT, euthanasia, abortion) is well documented, such evolution with regard to *political change* (transition from one sort of government to another) is less well documented. Constitutions not only constitute but should also protect against de-constitution. For supranational legal order to avoid a deadlock of „being in error" in the above sense, the systemic threats coming from within the polity's component parts must be recognised and constitutional design be changed accordingly.

The term "democratic backsliding" is understood as "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party". It highlights the errors in the design of the supranational legal order – the European Union. Although the European Union has faced many crises in recent years, including BREXIT and the euro crisis, the democratic backsliding in some of its Member States, is the most serious of all. The backsliders have trampled upon the values of democracy, rule of law, and human rights. In doing so, they have called into question the very foundations of European integration and have undermined the European project from within. As such the "democratic backsliding" undermines European post – war liberal consensus which has been built around the paradigm of „never again constitutionalism" and has been reinforced by the legal commitment of the states to make sure that dictatorships would never again arise out of constitutionalism. Political power at the domestic level was to become subject to new international and supranational checks and balances with the legitimacy of the power depending on the continuous adherence to the core values of liberalism, values that transcend the desires of the moment. Human rights and institutions (eg. courts) were given special place in this system of international and supranational checks and constraints imposed on the domestic *pouvoir constituant.* Yet, they were never meant to be alone.

The states themselves have recognised that the human rights would work best alongside three complementary safe-guards: i) rule of law and the constitution as the supreme law of the land binding on both the political power *and* the people; ii). mechanisms of supranational and international control whereby self-governing and sovereign states would hold each other to account according to principles of human rights, guarantees of democracy and openness to the world. iii). trust in the binding power of law that would commit the states to the discipline of community. All this underpinned by the suspicion of sovereignty. The trust has always been built on the convergence between the fundamental values of Member States and their legal orders on the one hand, and the foundations of the Union legal order, on the other. Indeed, as *P. Pescatore*, emphasised the supranationality was predicated on the idea of "*an order determined by the existence of common values and interests*" (*The Law of Integration. Emergence of a new phenomenon in international relations based on the experience of the European Communities* (Sijthoff, Leiden, 1974). At the heart of the European project has been a fundamental commitment to a set of First Principles (term borrowed from D. Edward, *An Appeal to First Principles*, unpublished manuscript on file with the Author) that the Member States, institutions, and civil society actors bound by the Treaties agree to respect and live by in their mutual dealings. The rule of law has been among the most essential of these First Principles essential to the post-war consensus as it started transforming "a political power" into "political power constrained by law".

And yet despite all this talk of hope and learning from the past, the EU constitutional system and design have been always in error of "*normative asymmetry*": declarations and commitments have never been backed up with the sufficient enforcement tool-kit. Why? Back in 1951 the authority to ensure that states remain liberal democracies has not been effectively translated into *law* which might have been understandable given the fresh memories of horrors wrought upon the continent by II World War. The Founding Fathers must have taken for granted that these memories would always act as a sufficient deterrent against any future backsliding into authoritarianism. History never stops, though, it always moves and today the once unthinkable (an illiberal state *within* the Union) challenges the EU design. The failure of the EU enforcement in Hungary and now in Poland was clear on display: the EU has been always one step behind the events on the ground, lost in endless and ineffective diplomacy of indignation. The states which are the source of a distrust and fear have been called on to sit at trial over one of their fellow (and now backsliding) member states. The European institutions faced dangers they were not prepared and then also contributed to the crisis by their own incompetence and lack of political will. As a result, there was no coordinated systemic action. The capture marched on emboldened and strengthened by the lack of credible supranational counter-strategies.

Rethinking the constitutional design. What's in a name?

The democratic backsliding is not just another crisis of governance. Rather it strikes at the very core of the initial bargain that brought states together. The backsliding

changes a constitutional profile of component parts of the Union. The states not only fail to respect the First Principles but become „*different states*" in terms of their constitutional fabric. It comes with the constitutional narrative of *capturing* the *domestic,* and rejecting *international and supranational*, institutions. The constitutional capture stands for a systemic weakening of checks and balances and entrenching power by making future changes in power difficult. It is power-entrenching mechanism that has in-built spill-over effect and, as such, the potential of Europe – wide adverse consequences.

This is where the challenge of *rethinking* the constitutional design of the EU comes to the fore. *Rethinking* requires revisiting the *substance* of the EU membership by engaging with the new kind of regimes within the EU and asking what it means to be a member state of the EU in the XXI century. The language and perspectives through which the EU looks at its Member States must be challenged and changed. Member States must be invested in the legal order and the integration project by repeated acknowledgement that they want to respect the understanding of the EU legality and its First Principles that brought them together. The states must speak with one voice that they are ready to defer to the common institutions enforcing these Principles in the name of the community. This commitment would then translate into more technical aspect of the tools ("*how*") and build a remedial framework for the systemic and holistic response to the democratic backsliding.

The "*Essential characteristics of the EU law*" (term used by the Court of Justice in its Opinion 2/13, para 167), must go today beyond traditional "*First Principles*" of supremacy and direct effect, and instead embrace the rule of law, separation of powers, independence of the judiciary and enforceability of these principles as integral part of the ever – evolving EU legality. Together these essential characteristics of EU law have given rise to what the Court has imaginatively called: „*a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe*". The rule of law, integrity of the legal system and judicial independence are the core principles of the original consensus that brought member states together. The novel part of the argument would be to make art. 19 of the Treaty of the European Union (TEU) in conjunction with art. 2 TEU (enumerating the values on which the EU is based) the cornerstone of the EU legality. While the "*existential jurisprudence*" at the service of the EU legality calls for the imaginative and engaged interpretation from the courts, it would never work in isolation. The courtroom alone might achieve only so much. Its full impact will only be realised when the political institutions exhibit the readiness to complement the existential jurisprudence with their own expertise and enforcement of the First Principles. For the Court to effectively exert its judicialization effect on the EU governance, it must be backed up by the political branches of the EU. As a result, the litigation strategies of the European Commission must now respond to the ongoing shift in the courtroom by framing arguments against the background of "the law" (art. 19 TEU) and the existential jurisprudence.

The *rethinking* would invite constitutional lawyers to move beyond dangerously over – inclusive and nebulous "populism talk" and instead focus on, and deal with, the constitutional features of the emerging populist constitutional doctrine that challenges the basic underpinnings of the liberal constitutionalism and calls into question the standard origin story of the EU. The contours of this new doctrine/ tradition revolve around few basic tenets. The politics rather than being tamed and constrained by law, are increasingly seen as the threat to the constitution. The constitutions are no longer seen as shields against the state, rather they protect the uniqueness of the state and nation understood in ethno-cultural terms. Constitutional courts are transformed from counter – majoritarian institutions to government enablers, rule of law becomes rule by law, checks and balances are frowned upon as liberal inventions serving the few etc.

However, *rethinking* calls for more than retooling *the legal register*. When dealing with the democratic backsliding, one has to avoid danger of being trapped in the world of legal expertise and arcane legalistic approaches to the current crisis. The question "*how*" the EU constitutional design should be adapted must go hand in hand with revisiting the "*why*" question. In other words: Changing the ailing constitutional design of the EU in the name of Whom?

Rethinking as going beyond lawyers' heads

As rightly commented by D. Edward "*[…] our endless discussion of How has caused us to lose sight of Why*" The problem with the EU – wide response to the democratic backsliding from within boils down to not so much the lack of common point of reference, but rather to the lack of understanding among People's of Europe *why* and *how* the quality of democracy and the rule of law in one of the member states should matter to them. EU needs build trust not only in the its member states' adherence to democratic values and the rule of law, but first and foremost, construct a civic narrative and loyalty to these allegedly shared values. As long as that does not happen, even most ambitious legal proposals for the rule of oversight in the EU will founder on the sands of lack of democratisation and apolitical ethos of the European polity, leaving the citizens with the hopeless feeling that this is yet another debate for *afficionados*. Therefore, the EU must be able to defend the narrative and explain at the domestic level not only *what* and *how* the EU is "doing things", but also *why* it acts to defend voluntary commitments and duties adopted by the states on the Accession. Europe needs its own voice and counter-narrative in defense of the rule of law that would be heard in the national capitals.

These intangibles go well beyond the (important no doubt) talk of procedures, paragraphs, new institutions etc. They ask questions about the political will and imagination, readiness and, yes also political courage, to stand up for, and defend, the common project against the domestic idiosyncrasies, fleeting voters' preferences and electorates. True debate about the rule of law oversight needs these intangibles just as much as strong legal mechanisms. As things stand right now, domestic rule of law and independence of courts are of no concern to Dutch, French etc. people. Without such recalibration of our perspectives and loyalties, rule of law oversight is doomed to be no more than a patching-up process, here and there, rather than much

needed global and principled approach that would look to the causes, not simply cure the symptoms.

Therefore the challenge of *rethinking* the EU constitutional design today faced with the democratic backsliding from within must be based on two existential pillars: (I) Member states must be invested in the legal order and the integration project by repeated acknowledgement that they want to respect the values that brought them together and that they are ready to share these values with others; this will then translate into more technical aspect of the tools („*how*"); (II) society of citizens must feel fidelity to values that truly define them as Europeans, rather than mere decorum belonging as a result of their member states accession. Only the sum of (I) *and* (II) can ensure long-lasting success. We knew for years now that (II) has been missing since the inception of the European project and that the civic register has never been really activated. Unfortunately as of now „the ever closer union" continues to be bound together by the fact of statal membership with the citizens still lurking in the shadow (despite valiant rhetoric to the contrary from the Court of Justice) of this state – driven narrative. The Union continues to be a Union of states and at best market – driven and self -interested economic operators. Without (I) *and* (II), the EU's rule of law suffers from existential drawbacks. While the EU should continue its efforts to secure observance to the rule of law, it must at the same time show more readiness for critical rethinking of its current mandate and limitations in the rule of law department, and more broadly constitutional design. At some point, Treaty changes might be indeed needed to reflect the (un)constitutional change within the polity. The challenge of responding to the backsliding and the ensuing change in the constitutional fabric of the Union goes clearly beyond institutional and procedural dimension. Have we managed to move beyond *ad hoc* patching – up of the sinking ship, and onto more systemic rethinking of the system's ailments? I think so far, we have not. The crucial „*moral authority for a claim to obedience to the Rule of Law*" is still missing. As long as *the union of states* does not make a leap towards *community of values shared and enforced in the name of the European peoples*, rule of law crises are here to stay with us. Indeed J. Weiler's warning should be heeded: the EU „*should simultaneously hurry up and put its own democratic house in order lest it be reminded again that those living in glass houses should be careful when throwing stones*" (J. H. H. Weiler, *Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law*, in C. Closa, D. Kochenov, (eds.,), *Reinforcing Rule of Law Oversight in the European Union*, (Cambridge University Press, 2016), at p. 325 – 326).

The *rethinking* I am talking about here thus calls on appreciating the interaction between the legal dimension of the integration (search for optimal *tools and enforcement competences* to safeguard the EU legality) and its ethical face (*narrative and justification that would explain in the name of whom the EU legality is defended*). Only the sum of I (*commitment of the member states*) *and* II (*constitutional design*) *and* III (*triggering the civic register*) can ensure long-lasting credibility and legitimacy of the EU legality. In the end, discussion of unconstitutional domestic change, the supranational resilience and design, must weave together high hopes, concerns, and yes, also disappointments, healthy skepticism and political

constraints. *The latter* must be as much part of our rethinking the changing fabric of the European liberal consensus and the ways forward, as *the former.*

With such recalibration and necessary pragmatism, it will become obvious that the assumptions that reigned supreme not long time ago must no longer be taken for granted today. Rather the democratic backsliding must force political leaders and constitutional lawyers alike into asking uneasy questions: Is the EU really a celebration of liberal democracy? Are the values still shared by all parties to the original bargain? Does the authority of law and respect for the law continue to bind the states together? Is the Court of Justice still considered one court for all the member states? To what extent is the mutual trust the backbone of the legal system of the EU? Is the democratic consolidation in the post-post-communist states really irrevocable and linear? These questions are as dramatic as the crisis that brought them to the forefront of the European legal discourse. Only asking them and then taking the uncomfortable answers seriously, will give the EU constitutional design a new lease of life.
